IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No.....

ALFRED COOKMAN MINER, INDIVIDUALLY AND AS SUCCESSOR TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JULIA A. MINER, DECEASED,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

There was no written opinion by the District Court, which adopted the Master's Report (R. 44-48). The opinion of the Circuit Court of Appeals (R. 120-125) is reported as *"Reconstruction Finance Corp.* v. *Central Republic Trust Co.*, 128 F. (2d) 242."

Jurisdiction.

The jurisdiction of this court is invoked under Section 240-A of the Judicial Code, as amended by the act of February 13, 1925. The decision hereby sought to be reviewed was entered May 18, 1942.

Statement of the Case.

The present case was instituted by the Reconstruction Finance Corporation, as a representative suit on behalf of itself and all other creditors of the Central Republic Trust Company and its predecesesor corporations, against the stockholders of said corporations to enforce the liability imposed by the Illinois constitution. Petitioner appeared pursuant to notice and introduced evidence of a claim against the stockholders in the amount of $229,409.52. No proof was introduced by the stockholders. The Master refused to consider the claim upon its merits, holding that orders of the Circuit Court introduced in evidence by the petitioner and the respondent limited the claim to the amount of $25,000.00 (R. 44-8). The Master's Report was approved by the District Court, and the order of the District Court affirmed by the Circuit Court of Appeals. A concise statement of the material facts is set forth on the second and third pages of the petition and is not, therefore, repeated here.

Specification of Errors.

1. The court below erred in ignoring and holding ineffectual an express reservation of right against a co-obligor by relying upon Illinois cases which have been overruled and ignoring numerous sources revealing a uniform and well understood principle of Illinois law.

2. The court below erred in refusing to give full faith and credit to the judgment of the Circuit Court of Cook County, Illinois, entered April 13, 1940, expressly reserving the right of the claimant to proceed against the stockholders of the Central Republic Bank and Trust Company for a greater amount than $25,000.00.

ARGUMENT.

I.

The Court Below Decided an Important Question of Illinois Law Upon Overruled Cases, and Has Rejected Overwhelming Evidence of a Contrary Local Rule Uniformly Followed for Over Half a Century.

Until the decision in the present case, the law of Illinois was thought to be clearly settled that if one co-obligor were released with an express reservation of right against others, the release would be considered as a covenant not to sue and would be no bar to the prosecution of claims against those co-obligors as to whom rights were reserved. The decision here sought to be reviewed, ignoring a long line of Illinois authority to the contrary, reverts to the ancient common law rule that if words of release are used in discharging one co-obligor all other co-obligors are thereby discharged, regardless of any attempted reservation, which was considered repugnant and void. Apparently this ancient and much criticised common law doctrine persists in Illinois in tort cases but the modern view was established in Illinois as early as 1867 in the case of *Parmelee, et al.* v. *Lawrence,* 44 Ill. 405. It is true that in the case of *Benjamin* v. *McConnell,* 4 Gilman 536; 9 Ill. 442, (decided in 1847) the Supreme Court of Illinois laid down the rule that the release of one of two or more joint obligors was *ipso facto* a release of all and an express proviso to the contrary, being repugnant to the contract of release itself, was void. Russell H. Curtis, an eminent member of the Chicago Bar who annotated these reports, makes the following comment upon this case, which is ap-

pended in a footnote appearing at the bottom of page 443 in the present official report:

> "Overruled. If release of one of several obligors shows upon its face in connection with surrounding facts, that it was intention of parties not to release co-obligors, such intention will be given effect. *Parmelee* v. *Lawrence,* 44 Ill. 405, 413; *Parmelee* v. *Lawrence,* also overruled, *Rice* v. *Webster,* 18 Ill. 331, 333, which followed *Benjamin* v. *McConnell.*"

In 1857 the court, in the case of *Rice* v. *Webster,* 18 Ill. 331, adhered to the rule of *Benjamin* v. *McConnell.* In the present official reports an annotation by Messrs. Edwin Burritt Smith and Ernest Hitchcock of the Chicago Bar is as follows:

> "But see *Parmelee, et al.* v. *Lawrence,* 44 Ill. 405, for a review of these cases, and where it is said the weight of modern authority is against them, and in favor of the doctrine of intention, as governing such releases."

Counsel for appellant earnestly insisted in the court below that the *Rice* and *Benjamin* cases were in fact, though not expressly, overruled in the case of *Parmelee* v. *Lawrence,* 44 Ill. 405, in which the court states, at page 413:

> "On the question as to the effect of this release, counsel for appellants have cited the cases of *Benjamin* v. *McConnell,* 4 Gilm. 536, and *Rice* v. *Webster,* 18 Ill. 331. It will be observed from what we have already said that there are facts in this case which widely distinguish it from either of those. We would further add that the weight of the modern authorities is against these cases, and in favor of the more reasonable rule, that where the release of one of several obligors shows upon its face, and in connection with the surrounding circumstances, that it was the intention of the parties not to release the co-obligors, such intention, as in the case of other written contracts, shall be carried out, and to that end the instrument shall be construed as a covenant not to sue. Parsons, in his work on contracts, volume 1, page 24, uses the

following language: 'But though the word "release" be used, even under seal, yet if the parties (the instrument being considered as a whole, and in connection with all the circumstances of the case and the relations of the parties) cannot reasonably be supposed to have intended a release, it will be construed as only an agreement not to charge the person or party to whom the release is given, and will not be permitted to have the effect of a technical release; for a general covenant not to sue is not of itself a release of the covenantee, but is so construed by the law to avoid circuity of action; and a covenant not to sue one of many who are jointly indebted does not discharge one who is a joint debtor to the covenantor, nor in any way affect his obligation.' This rule is substantially so laid down in the following cases: *North* v. *Wakefield,* 66 Eng. C. L. 536; *Willis* v. *DeCastro,* 93 id. 215; *Sully* v. *Forbes,* 2 B. & B. 46; *Kirby* v. *Taylor,* 6 Johns. Ch. 242; *Clagett* v. *Salmon,* 5 Gill & Johns. 351; *Lysaght* v. *Phillips,* 5 Duer, 116; *Wiggin* v. *Tudor,* 23 Pick. 444; R. M. Charlton (Geo.) 267."

From the foregoing language, it would appear that the Supreme Court of Illinois, while wishing to avoid the judicial discourtesy of expressly overruling by name the considered decisions of judges no longer sitting upon the court, chose rather to distinguish the cases upon the facts but proceeded to lay down in very clear terms a precisely contrary doctrine from that of the cases nominally distinguished.

In Williston on Contracts, Revised Edition, Volume 2, Paragraph 338, Pages 992-3, appears the following statement:

"The same effect is given to a release by the creditor which contains an express reservation of his rights against the other joint debtors. In fact such an instrument is in terms contradictory. If it is to be regarded as a true release of one joint debtor, it would be legally impossible to reserve rights against the others, for their obligations could not continue to exist without all being bound. In order to give effect to the

> manifest intention of the parties as nearly as possible, the courts have therefore held that a release with such a reservation is in legal effect no release at all, but merely a covenant not to sue."

In accord with this statement the text cites the Restatement of Contracts, Paragraph 122, and numerous cases *inter alia:*

"*Parmelee* v. *Lawrence,* 44 Ill. 405 (virtually overruling *Rice* v. *Webster,* 18 Ill. 331); *Van Meter* v. *Gurney,* 251 Ill. App. 184."

In the Restatement of the Law of Contracts, Section 122, the rule is stated:

> "Written or oral words of a person entitled to enforce a promise which purport to discharge the promisor but expressly to reserve rights against other promisors jointly bound for the same performance do not operate as a discharge of the promisor but only as a promise not to sue him, except that a written discharge cannot be varied by an accompanying oral statement or agreement that rights against other promisors are reserved."

The Illinois annotation to the restatement, prepared by Harold Wright Holt under the auspices of the Illinois Bar Association, makes the following comment upon this section:

> "*Parmelee* v. *Lawrence* (1867) 44 Ill. 405; Id. (1870) 11 Wall. (78 U. S.) 36, 20 L. Ed. 48 seems to have settled the law of this state in accord with the Restatement as to the effect of the release of one joint obligor with reservation of rights against others."

Paragraph 403 of the Restatement is that:

> "A release may be in any form of words, but general words of release may be controlled by recitals and by context showing that unless the words of release are so restricted the object of the writing will be frustrated."

The Illinois annotation upon this section is as follows:

> "The law of Illinois *accords.*
>
> "*Accord* with the *Illustration: Parmelee* v. *Lawrence* (1867) 44 Ill. 405 (which overrules *Benjamin* v. *Mc-*

Connel (1847) 4 Gilman 536, 46 Am. Dec. 474 and *Rice* v. *Webster* (1857) 18 Ill. 331): *Thomason* v. *Clark* (1889) 31 Ill. App. 404; *Nickerson* v. *Suplee* (1912) 174 Ill. App. 136, 139 (*dictum*). A release of right against a principal debtor, with a reservation of right against a surety, is treated as a covenant not to sue the principal debtor: *Mueller* v. *Dobschuetz* (1878) 89 Ill. 176 (*semble*); *Dupee* v. *Blake* (1893) 148 Ill. 453, 465, 35 N. E. 867, 871."

The following statement appears in 53 C. J., 1251, upon the subject of release, paragraph 74:

> "There is more authority to the effect that where the intention of the releasor not to release obligors other than the releasee is manifested by such an express reservation, it will prevail."

The following note is appended thereto:

> "*Parmelee* v. *Lawrence,* 44 Ill. 405 (distinguishing and not following *Rice* v. *Webster,* 18 Ill. 331, and *Benjamin* v. *McConnel,* 9 Ill. 536, 46 Am. Dec. 474); *Van Meter* v. *Gurney,* 251 Ill. App. 184. Contra *Rice* v. *Webster,* 18 Ill. 331; *Benjamin* v. *McConnel,* 9 Ill. 545, 46 Am. Dec. 474."

In the case of *Van Meter* v. *Gurney,* 251 Ill. App. 184, the court stated at page 187:

> "We do not consider *Rice* v. *Webster,* 18 Ill. 331, or *Petroyeanis* v. *Pirola,* 205 Ill. App. 310, as controlling. The former case was in effect overruled in *Parmelee* v. *Lawrence,* 44 Ill. 405."

In the case of *Moore* v. *Stanwood,* 98 Ill. 605, the Supreme Court held that the discharge of one of several co-obligors did not operate to discharge the remainder, relying upon the authority of *Parmelee* v. *Lawrence,* 44 Ill. 405. It should be noted that in the present case the bank which was released, at the time of the release, was insolvent and had been in receivership for a number of years.

The rule laid down in *Parmelee* v. *Lawrence,* has been

quoted with approval by the Supreme Court of Illinois in the case of *Clark* v. *Mallory*, 185 Ill. 227, at 233.

The rule laid down in *Parmelee* v. *Lawrence* has been uniformly adhered to by the Appellate Court of Illinois in the following cases:

Thomason v. *Clark*, 31 Ill. App. 404, at 407.
Nickerson v. *Suplee*, 174 Ill. App. 136, at 139.
Mueller v. *Lloyd*, 181 Ill. App. 230, at 245-6.
Wallace v. *Armstrong*, 236 Ill. App. 457, at 460.
Rice v. *Barkman*, 249 Ill. App. 127, at 130.
Forster v. *Sheridan Tr. & Svs. Bk.*, 257 Ill. App. 463, at 472.

Although the stockholders of an Illinois bank are primarily and severally liable for the obligations of the bank and resort need not be made to the corporation (*Reconstruction Finance Corporation* v. *McCormick*, 102 Fed. 2nd 305) the reservation of right against the stockholders would be given effect if they were merely sureties. *Dupee* v. *Blake*, 148 Ill. 453 (citing *Parmelee* v. *Lawrence*). In the recent case of *City National Bank & Trust Company* v. *Burnham*, 297 Ill. App. 211, at 236, the court states:

> "The law of suretyship is well settled that where a creditor expressly reserves his rights against the surety, at the same time that he agrees with the principal to an extension of the contract, or even to a release of the principal, the surety will not be released. *Mueller* v. *Dobschuetz*, 89 Ill. 176; 4 Williston on Contracts, Revised Edition, Section 1230."

In the face of the foregoing sources of information as to the law of Illinois, the Circuit Court of Appeals has based its decision upon the principles laid down in the out-dated and discredited cases of *Rice* v. *Webster*, 18 Ill. 331; *Benjamin* v. *McConnell*, 9 Ill. 442. The court disposes of the contention that these cases have been overruled with the comment: "We think there is no merit in this contention" without discussion or analysis of the

authorities. Nor can it be said that the decision of the court may be justified upon any other ground since the issue is clearly defined. If it is possible by any language to reserve a right of action against one co-obligor in Illinois, while releasing that of another, such was the effect of the order of the Circuit Court of April 13, 1940 (R. 39-43). There is in that order no reservation by implication but the principles and intended effect of the order are spelled out in terms so clear that even he who rides may read. The order clearly has two parts: first, the finding that the claim of Miner against the assets in the hands of the receiver shall be limited to $25,000.00; and second, that the rights of Miner to continue to prosecute his claims against the stockholders shall be unaffected thereby. The court below has ignored the intention of the parties to the agreement and the express terms of the order revealing that intention, but held that in agreeing to limit his claims to $25,000.00 against the insolvent bank Miner necessarily and *ipso facto* limited his claim against the stockholders to the same amount in spite of the expressed intention that his rights against the stockholders be unimpaired.

It is no answer to say that the accounts were approved, for the accounts were approved in part only. The claims asserted by Miner against the trustee were, by agreement, sustained in a limited amount in the Circuit Court, but there has been no adjudication in any court of the full amount of Miner's claims. Proof was offered in the Federal District Court, which the court refused to consider because it held that when Miner agreed to limit his claim against the bank, without prejudice to his rights against the stockholders, he thereby limited his claim against the stockholders. The agreement of Miner and the receiver approved by the court presiding over the liquidation of the affairs of the Central Republic Trust Company, has been ignored by the Federal Courts. Miner's obligation under

the agreement is extended; the major benefit to be received therefrom is substantially refused.

It is conceded that in Illinois the release of one joint tort-feasor would release all, but it cannot be urged that the liability here asserted is in tort. The distinction between liability in tort and for breach of trust is well understood. Scott on Trusts, Section 198. The liability of stockholders in Illinois banks is, of course, contractual. *Babka* v. *City State Bank of Chicago,* 264 Ill. App. 142. The Master appeared to place great reliance upon the memorandum opinion in the District Court in the case of *De Met's* v. *Samuel Insull* (R. 46-47). In that case the court held that all of the tort-feasors were released by the discharge of some of them. Upon appeal to the Circuit Court the distinction between liability in tort and in contract was sharply drawn. In the case, reported as *Aiken* v. *Insull,* 122 Fed. (2d) 746, at page 751, the court stated:

> "We take it, however, that the harsh rule as to a release of one joint tort-feasor does not prevail in the contract cases. *Parmelee* v. *Lawrence,* 44 Ill. 405; *Nickerson* v. *Suplee,* 174 Ill. App. 136. According to the *Parmelee* formula, if there is language in the release of a joint debtor manifesting an intent to preserve the releasor's rights against the other co-obligors, effect is given to this manifestation. Strange though it may seem, the Illinois courts have not seen fit to extend this wholesome and common-sense formula to the tort cases. We fail to see a good reason for drawing this distinction between joint tort-feasor cases and joint debtor cases, compare *Brown* v. *City of Cambridge,* 3 Allen 474, 85 Mass. 474, 477, but we must accept the limitation fixed by the Illinois courts."

It seems quite clear that the court below has erroneously extended the rule applied in tort cases in Illinois to cover a case which is obviously one of contract.

It cannot be maintained that there is anything in the law of partnership in Illinois which would change the rule universally applied to joint or joint and several obliga-

tions. In the case of *Forster* v. *Sheridan Trust & Savings Bank*, 257 Ill. App. 463, the court held that a document which was in terms both a release and a covenant not to sue should, in the light of extrinsic circumstances, be considered to be a covenant not to sue. The court then, upon the authority of *Parmelee* v. *Lawrence*, 44 Ill. 405, held that the release of one partner did not operate to discharge a co-partner. This case cannot be reconciled with *Rice* v. *Webster* and *Benjamin* v. *McConnell*. Apparently, it, as well as all other of the cases heretofore cited in the Appellate Court, was ignored by the Circuit Court of Appeals simply because they were intermediate courts of review and not the Supreme Court of Illinois.

The court below in its opinion states (R. 124):

> "We think the decree of the district court which approved the conclusions of the master is in full accord with the decisions of the *highest* courts in Illinois." (Italics supplied.)

The rule is that a federal court must consider the decisions of intermediate courts as well as the Supreme Court in determining the questions of local law. The principle has been clearly stated by this court in the case of *West* v. *American Tel. & Tel.*, 311 U. S. 233, at pages 236-7 as follows:

> "A state is not without law save as its highest court has declared it. There are many rules of decision common and accepted and acted on by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from *all* the available data what the state law is and apply it rather than to prescribe a different rule. * * *" (Italics supplied.)

The court below has ignored decisions and dicta of both the Supreme Court and the Appellate Court of Illinois. It has ignored the opinions of scholars in the field. It has resorted to two early cases decided by the Supreme Court of Illinois and has failed to note that the uniform line of decisions in Illinois for more than eighty years has been to the contrary.

We challenge counsel for respondent to produce a single reported case in Illinois, decided since 1860, which by decision or dictum indicates that a joint obligor will be discharged by the release of his co-obligor in spite of an express reservation to the contrary.

II.

The Court Below Has Refused to Extend Full Faith and Credit to the Judgment of the Circuit Court of Cook County.

The courts below have refused to accord the judgment of the Circuit Court of Cook County the full faith and credit which is its due under Title 28, Section 687, U. S. C. A. In the case of *Milliken* v. *Meyer*, 311 U. S. 457, 61 Sup. Ct. Rep. 339, this court stated:

> "When a judgment rendered in one state is challenged in another, want of jurisdiction over either the person or the subject matter is, of course, open to inquiry. *Grover and Baker Sewing Machine Co.* v. *Radcliffe*, 137 U. S. 287; *Adam* v. *Saenger*, 303 U. S. 59. But if the judgment on its face appears to be a 'record of a court of general jurisdiction such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence or by the record itself.' *Adam* v. *Saenger, supra*, at page 62. In such a case the full faith and credit clause of the constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision or the validity of the legal principles on which the judg-

ment is based. *Fauntleroy* v. *Lum*, 210 U. S. 230; *Roche* v. *McDonald*, 275 U. S. 49; *Titus* v. *Wallick*, 306 U. S. 282. Whatever mechanics of law may underlie the judgment (*Cooper* v. *Reynolds*, 10 Wall. 308) it is 'conclusive as to all the *media concludendi*.' *Fauntleroy* v. *Lum*, *supra*, at page 237."

In the face of these well settled principles, the Federal Court has chosen to disregard the terms of the order of the Circuit Court of Cook County, which is, under the Illinois Banking Act, charged with the responsibility of liquidating the affairs of the bank. The Circuit Court order states that Miner is free to prosecute his claim in the Federal Court for a larger amount than that which he agreed to accept from the receiver of the insolvent bank. The Federal Court ignores this preservation of right and holds that Miner is bound by a bargain he did not make; that when he bargained his share in the assets of the bank, he was at the same time limiting his recovery from the stockholders. The Federal Court accepts the State Court's order for a purpose for which it was not intended, namely, limitation of recovery from the stockholders, and rejects it as to the provision preserving Miner's rights against the stockholders.

The order allowing a claim in a bank liquidation proceeding is a final order having the effect of and being in fact a judgment. *People* v. *Farmers State Bank*, 281 Ill. App. 354. The Circuit Court had jurisdiction (R. 39). *People* v. *Ottawa B. & T. Co.*, 287 Ill. App. 499, 5 N. E. (2d) 275. The court's refusal to respect the judgment has the effect of denying to Miner any recovery whatsoever from the stockholders of the bank, since the greater part of the claim in the liquidation proceeding has been paid and all, or substantially all, of the balance will be paid from funds in the receiver's hands. The beneficiaries of a quarter million dollar trust, dissipated by the maladministration of the insolvent corporation, are precluded from recovering from the stockholders of that corporation lia-

bilities imposed by the Constitution of the State of Illinois. Because Miner decided to terminate bootless litigation with the receiver of an insolvent corporation, upon the assurance that he could continue to pursue his claims against the solvent stockholders, he has been denied the right to recover from those stockholders. He did release the bank and the receiver of the bank but he did so in reliance upon the commonly accepted view of the bar and bench of the State of Illinois that he could effectively reserve his rights against the stockholders. He had the assurance of the order of the Circuit Court of Cook County that he might continue to prosecute his claim (R. 42) and the acceptance of the nominal claim of $25,000.00 should not be deemed an adjudication of the total loss suffered by the trust estate (R. 43).

Miner proceeded to introduce proof in the Federal Court of the nature and extent of his claim and establish damages in the total sum of $229,409.52. The stockholders, against whom judgment was sought and who are the only persons affected by the allowance or disallowance of Miner's claim, put in no proof whatsoever. The Reconstruction Finance Corporation (purporting to represent Miner as a creditor of the bank, as well as all other creditors of the bank) took it upon itself to oppose the allowance of Miner's claim, although the claim was asserted against stockholders against whom the Corporation itself could not possibly recover. Miner's claim accrued on July 25, 1931, long before the Reconstruction Finance Corporation became a creditor of the bank (R. 55). The stockholders did not appear in the Circuit Court of Appeals to contest the allowance of Miner's claim. There has been and is no defense upon the merits. Miner's claim, if it is to be defeated at all, can be defeated only by an application of the rule that the release of one joint obligor necessarily discharges the others, despite an express contrary reservation. It is further necessary to accept in part and to reject in part a judgment of

the Circuit Court of Cook County and to hold a final order of a court having jurisdiction of the subject-matter an empty and meaningless mockery. The courts below have seen fit to take both steps at the request of a government corporation having no monetary interest in the outcome. The clearly expressed intention of the Circuit Court of Cook County and the litigants before it has been denied and frustrated. The judgment of the Circuit Court has been flouted and disregarded as a nullity. The decision of the court below should be reversed. The writ of certiorari should be issued to review that judgment.

Respectfully submitted,

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Petitioner.

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